Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

Nos. 00-1770, 00-1781

IN THE

Supreme Court of the United States

UNITED STATES DEP'T OF HOUSING & URBAN DEVELOPMENT,

Petitioner,

- and -

OAKLAND HOUSING AUTHORITY,

Petitioner,

v.

PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE, and BARBARA HILL,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CENTER FOR THE COMMUNITY INTEREST IN SUPPORT OF PETITIONERS

H. JOSEPH ESCHER, III
Counsel of Record
KEITH D. KESSLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4065
(415) 434-1600

Attorneys for Amicus Curiae Center for the Community Interest

170738

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of Interest of Amicus Curiae	1
Summary of Argument	3
Argument	8
I. The Full Legislative History of Section 1437d(*l*)(6) And Its Implementing Regulations Demonstrates The Validity Of The Regulations.	8
A. The Ninth Circuit's Legislative History Argument.	8
B. The Complete Legislative History Of Section 1437d(*l*)(6).	11
II. Petitioners' Straightforward Application Of The Plain Language Of Section 1437d(*l*)(6) Does Not Yield "Absurd" Results.	21
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Bennis v. Michigan, 516 U.S. 442 (1996) 2

Burton v Tampa Hous. Auth., No. 00–13607, 2001 WL 1379724 (11th Cir. Nov. 7, 2001) 4, 5, 7, 13, 20, 24

Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 6

City of S. San Francisco Hous. Auth. v. Guillory, 49 Cal. Rptr. 2d 367 (Cal. App. Dep't Super. Ct. 1995) 10

Delaware County Hous. Auth. v. Bishop, cert. denied, 149 L. Ed. 2d 502 (Apr. 16, 2001) 2

Dickerson v. United States, 530 U.S. 428 (2000) 1

Escalera v. New York Hous. Auth., 924 F. Supp. 1323 (S.D.N.Y. 1996) 2

Hous. Auth. v. Green, 657 So. 2d 552 (La. App. 1995) 10

Kansas v. Hendricks, 521 U.S. 346 (1997) 2

Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700 (Minn. 1999) 23

Cited Authorities

Page

Montana v. Egelhoff, 518 U.S. 37 (1996) 2

Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998) *2*

Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994) 2

Rucker v. Davis, 203 F.3d 627 (9th Cir. 2000) 2, 3

Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2000) 8, 9, 21, 22, 23, 24

Syracuse Hous. Auth. v. Boule, 701 N.Y.S.2d 541 (App. Div. 4th Dep't 1999) 10

United States v. Knights, No. 00–1260 (2001) 1

United States v. X-Citement Video, 513 U.S. 64 (1994) 22

Statutes:

42 U.S.C. § 1437 .....4, 21, 23

42 U.S.C. § 1437d(*l*)(5) 12

42 U.S.C. § 1437d(*l*)(6) 3, 4, 5, 7, 8, 10, 11, 12, 21

42 U.S.C. § 11901(1)–(2) 11

Cited Authorities

	Page
42 U.S.C. § 11901(3)–(5)	11
Pub. L. No. 101–625, § 504, 104 Stat. 4185 (1990)	12
Pub. L. No. 104–120, § 9, 110 Stat. 834 (1996)	17
Other Authorities:	
24 C.F.R. § 966.4(f)(12)(i)	14
24 C.F.R. § 966.4(*l*)(2)(ii) (1993)	13
24 C.F.R. § 966.4(*l*)(5)(1)	15, 22, 23
56 Fed. Reg. 51,560, 51,566 (1991)	14
56 Fed. Reg. 51,560, 51,578 (1991)	13, 15
56 Fed. Reg. 51,566–51,567 (1991)	13, 14, 15, 16
H.R. CONF. REP. No. 943 (1990)	10
134 Cong. Rec. at E1965–02 (June 14, 1988)	24
134 CONG. REC. H11108, H11109 (1988)	19
136 Cong. Rec. 15,991, 16,012 (1990)	10
S.566, 101st Cong., 2d Sess. §§ 521(f) and 714(a) (1990)	10

Cited Authorities

	Page
S. REP. No. 101–316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763	9
Address Before a Joint Session of the Congress on the State of the Union, 32 WEEKLY COMP. PRES. Doc. 90 (Jan. 23, 1996)	17
Crime in America: Three Ways to Prevent It, Hearings on H.R. 3 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong., 1995 WL 20741 (Jan. 20, 1995)	16
DEP'T OF HOUSING AND URBAN DEVELOPMENT, *"One Strike and You're Out" Policy in Public Housing* 1 (March 1996)	5, 17, 18, 19, 25
Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing, 32 WEEKLY COMP. PRES. Doc. 582 (Mar. 27, 1996)	17
Dennis Saffran, *Public Housing Safety Versus Tenants' Rights*, 6 THE RESPONSIVE COMMUNITY 34 (Fall 1996), *vacated*, 222 F.3d 614 (9th Cir. 2000)	3, 18, 19
Dennis Saffran & Eliot Spitzer, *When Housing Tenants Commit Crimes*, N.Y. DAILY NEWS, Aug. 25, 1996	3

Cited Authorities

Page

Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, S. Doc. No. 101–234 (1989) 12, 25

Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of Other Tenants, WALL ST. J., July 6, 1989 12

The Drug Problem and Public Housing: Hearings Before the House Select Comm. on Narcotics Abuse and Control, H.R. REP. NO. 101-1019 (1989) 16

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Center for the Community Interest ("CCI") is a national, not-for-profit organization dedicated to public safety and urban quality of life.[1] CCI works with public officials and community groups across the country to develop and defend policies that strike a common-sense balance between the rights of the individual and the needs of the larger community, *e.g.*, "Megan's Law" (notifying communities of released sex offenders in proximity), traffic sobriety checkpoints, and the "One Strike" eviction rule at issue in this case.

Through its National Neighborhood Safety Legal Network, CCI has organized and provided legal advice to hundreds of citizens groups across the nation, and has developed nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality of life cases before this Court and other courts throughout the country, and has developed model legislation, policies, and Internet resources that help communities address problems such as illegal gangs, disorder in public spaces, nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods. Most recently, CCI participated as amicus curiae before this Court in *United States v. Knights*, No. 00–1260 (2001) (defending suspicionless and warrantless searches incident to probation); *Dickerson v. United States*, 530 U.S. 428 (2000) (supporting

1. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus and its counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief and their letters of consent are being Lodged herewith.

admissibility of voluntary confessions given in the absence of Miranda warnings); *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (defending warrantless and suspicionless searches incident to parole); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (defending civil commitment of certain dangerous sex offenders); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); and *Bennis v. Michigan*, 516 U.S. 442 (1996) (defending asset-forfeiture programs to control street prostitution). CCI has the consent of all parties to this case to file this amicus brief in support of Petitioners.

With respect specifically to public housing policies, CCI intervened on behalf of the elected leaders of New York City's public housing tenants in *Escalera v. New York Hous. Auth.*, 924 F. Supp. 1323 (S.D.N.Y. 1996). CCI urged the *Escalera* court to modify a 1971 consent decree to allow the Housing Authority to pursue a "One Strike" eviction policy. CCI also intervened on behalf of tenants in Chicago to defend police searches for illegal drugs and weapons in public housing projects plagued by gang violence. *See Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994). In the past year, CCI has represented a Pennsylvania housing authority in filing a petition for certiorari asking this Court to review a decision of the Pennsylvania Supreme Court that undermined the One-Strike rule. *See Delaware County Hous. Auth. v. Bishop*, *cert. denied*, 149 L. Ed. 2d 502 (Apr. 16, 2001) (No. 00–1272).

In addition, CCI participated as an amicus in support of Petitioners' original appeal in this matter to the Ninth Circuit. The original three-judge panel cited one of CCI's articles in its opinion reversing the decision of the trial court. *See Rucker*

v. Davis, 203 F.3d 627, 631 (9th Cir. 2000) (citing Dennis Saffran, *Public Housing Safety Versus Tenants' Rights*, 6 THE RESPONSIVE COMMUNITY 34 (Fall 1996)), *vacated*, 222 F.3d 614 (9th Cir. 2000). That article was one of several that CCI staff and board members have published on the problem of crime and drugs in public housing. *See also* Dennis Saffran & Eliot Spitzer, *When Housing Tenants Commit Crimes*, N.Y. DAILY NEWS, Aug. 25, 1996, at op-ed page.

CCI is extremely concerned that the decision of the Ninth Circuit in this case, if ratified by this Court, would dangerously restrict the ability of local housing authorities to protect residents from criminal activity. This would undermine recent advances in promoting safety and lawful behavior in public housing communities, thereby placing law-abiding tenants and their families at increased risk of crime, and generally degrading the quality of life of public housing residents across the nation.

SUMMARY OF ARGUMENT

At first blush, this case seems to present a classic conflict between the application of a statute's plain language, on the one hand, and a creative judicial construction, motivated by sympathy, to avoid the harsh effects of that language on an impoverished and disempowered segment of society. But that conflict is false: in fact, the unwillingness of the Ninth Circuit's *en banc* majority to apply the clear language of 42 U.S.C. § 1437d(*l*)(6) will harshly disserve the innocent, law-abiding residents of public housing projects whom the court sought to protect. This fact motivated not only the four dissenting judges, but a very recent opinion in which a unanimous Eleventh Circuit panel "follow[ed] the lead of

Judge Joseph Sneed, as set forth in his comprehensive dissent in *Rucker*," and held that the plain language of Section 1437d(*l*)(6) foreclosed claims identical to Respondents'. *Burton v Tampa Hous. Auth.*, No. 00–13607, 2001 WL 1379724, at *2 (11th Cir. Nov. 7, 2001).

When the Department of Housing and Urban Development issued regulations that closely track the text of section 1437d(*l*)(6), it did not ignore a specific Congressional intent expressed solely in *other* statutory provisions and in the legislative history of an unenacted version of section 1437d(*l*)(6). Instead, the Department properly implemented two Congressional determinations about public housing, and about the local housing authorities responsible for its residents' safety.

The first is that such authorities should require tenants to accept, in their leases, a share of responsibility for helping reduce the drug-related crime that threatens to overwhelm many projects. The second is that the federal government should entrust local housing authorities with discretion to enforce those lease provisions after any such crime. Such entrustment accords with the general federal housing policy to maximize the responsibility vested in local housing authorities. *See* 42 U.S.C. § 1437.

Those local authorities should not have to devote their very limited resources to the daunting task of proving, with no prosecutorial powers, a case of negligence or conspiracy against a tenant when the dispositive issue of knowledge will almost always be a disputed factual question. While the majority opinion below seems only to interpolate an equitably appealing "innocent tenant" defense into the plain language

of the statute, its rule will in practical reality gravely undermine Petitioner's "One Strike And You're Out" policy to reduce crime, and protect tenants, in public housing. DEP'T OF HOUSING AND URBAN DEVELOPMENT, "*One Strike and You're Out" Policy in Public Housing* 1 (March 1996). The results of applying the plain language of section 1437d(*l*)(6) are neither absurd nor potentially unconstitutional, but instead serve sound public policy.

Turning from the level of policy analysis to that of administrative law and statutory interpretation, both an initial reading and careful scrutiny of section 1437d(*l*)(6) make clear what the Ninth Circuit *en banc* majority has done, and why. Troubled by the results, in some cases, of enforcing lease provisions dictated by regulations that, in turn, closely track a clearly worded statute, the majority struggled to perceive some ambiguity or gap in the statutory text that would allow it to deploy other tools of statutory construction, and so manufacture a Congressional intent contrary to the clear import of the text. While the *en banc* majority made arguments about that text, its history, and related provisions, the majority's belief that applying the statute literally would be so harsh as to be "absurd" plainly drove its effort to avoid the obvious reading of the section. The majority's sympathy for evicted tenants is understandable. Its concerns, however, are not only misguided at the practical and policy level, but could not in any event support its wholesale reconstruction of a statute whose language is, as the *Burton* court noted, "unmistakably clear." 2001 WL 1379724, at *2.

The fact that this case involves an agency's interpretation of that language made the Ninth Circuit's judicial reconstruction particularly difficult. It is well-settled that, when an agency charged with enforcing a statute has arrived

at and implemented a "permissible construction," a court may not substitute its judgment for that of the agency. *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Under *Chevron*, a court must first determine whether Congress has "directly spoken to the precise question at issue," in which case its intent governs. *Id.* at 842–43. If not, the court must decide if the agency's interpretation of an ambiguous provision, or filling of a statutory gap, is sufficiently reasonable and faithful to the statutory purpose not to be arbitrary. *Id.* at 843. Those two strictures required the *en banc* majority in this case to navigate a tortuous path between the clarity of the statutory text, on the one hand, and the closeness with which the implementing regulations track that text, on the other.

Specifically, *Chevron* required the *en banc* majority to make two inherently contradictory interpretive maneuvers. First, the majority had to contrive ambiguity into the statute's plain language, so as to avoid at *Chevron*'s first step the obvious (and correct) conclusion that Congress has "directly spoken to the precise question" in this case by mandating eviction for "any drug-related criminal activity," without mentioning any exception based on a tenant's lack of knowledge or fault. Immediately after finding the plain language ambiguous, the majority then had to use other tools of statutory construction to avoid proceeding to *Chevron*'s second step. At that second step, of course, the majority would have had to defer to HUD's plainly reasonable (indeed, almost mirror-image) construction of the statute.

Instead, the *en banc* majority assembled a melange of statutory-construction arguments based on other statutory sections, a Committee report on an unenacted version of the law at issue, and the court's view that applying the law

literally would yield "absurd" results and raise constitutional questions. It then concluded that Congress had "directly spoken to the precise question at issue" after all (albeit not in the statute's text) and had in fact expressed a specific intent diametrically opposed to that shown by the text. The *en banc* majority thereby evaded the need even to consider the reasonableness of the implementing agency's interpretation of the statute.

The majority below was right that there is no need to consider the reasonableness of HUD's interpretation, but that is because, as the dissent and the *Burton* court recognized, "HUD's interpretation is the only permissible construction of the statute." *Burton*, 2001 WL 1379724, at *2. Even were that not so, however, HUD's interpretation would be an eminently reasonably one entitled to deference under *Chevron*.

The dissenting judges below, the *Burton* court, and Petitioners in their briefs to this Court comprehensively analyze the *en banc* majority's failure to show ambiguity in the plain language of section 1437d(*l*)(6), or to show a clear expression of Congressional intent in other sections of the public-housing laws. CCI's focus accordingly is on examining all of the section's legislative history, and the challenging realities of efforts by PHAs with limited resources to combat drug-related crime in public housing.

ARGUMENT

I.

THE FULL LEGISLATIVE HISTORY OF SECTION 1437d(*l*)(6) AND ITS IMPLEMENTING REGULATIONS DEMONSTRATES THE VALIDITY OF THE REGULATIONS.

A general review of the history of the Acts that created and amended section 1437d(*l*)(6), and of HUD's promulgation of regulations to implement the section, makes clear Congress' intent to confer broad discretion on public housing authorities to enforce provisions, strictly when necessary, that make tenants responsible for helping stem the tide of drug-related crime. Before undertaking that review, however, we note how the court below misconstrued both the import and the weight of the lone fragment of legislative history that it addressed.

A. The Ninth Circuit's Legislative History Argument.

The *en banc* majority narrowly focused its discussion of legislative history on what it described as one of the "committee reports accompanying the statute" that amended section 1437d(*l*)(6) in 1990. *Rucker v. Davis*, 237 F.3d 1113, 1123 (9th Cir. 2000) ("*Rucker II*") (acknowledging that report concerned section's 1990 amendment, not its 1988 enactment); *see generally* discussion of legislative history *infra*. In that report, a Senate Committee noted its "anticipat[ion] that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [public housing authority (PHA)] and the eviction court" and added, as an example, that "eviction would not

be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps . . . to prevent the activity." S. REP. No. 101–316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. While acknowledging that PHAs "have discretion in deciding whether to initiate an eviction action under the statute" (*Rucker II*, 237 F.3d at 1123), the court suggested that such discretion can only apply in cases of culpable tenants, and concluded that, in the report, "Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants." *Id.*

The Ninth Circuit's conclusion is flawed in two respects. *First*, the report did not deny that PHAs have discretion to evict "innocent tenants." In suggesting that such evictions would not be "appropriate," the report necessarily implied that they would be authorized. If the statute simply forbade such evictions, the committee would have had no need to comment on whether they would be "appropriate." It would have simply noted instead that they were unauthorized or forbidden. The report's reference to the need for PHAs to "exercise . . . humane judgment" simply is not limited to cases of "culpable tenants." Indeed, while the court posited a binary distinction between "innocent" and "culpable" tenants, a significant part of an actual PHA's exercise of judgment in real cases lies in deciding how to evaluate tenants whose circumstances place them at various points on a spectrum of which "innocent" and "culpable" are the abstract endpoints.

Second, "Congress" did not accept or reject *any* notion in the report quoted by the court. In stating to the contrary, the court failed to note that the Senate committee report it quoted had discussed a Senate bill that differed from that

enacted by the 1990 Congress—and that would have made it harder for PHAs to show cause for eviction for drug-related crimes. *See* 136 Cong. Rec. 15,991, 16,012 (1990) (reproducing S.566, 101st Cong., 2d Sess. §§ 521(f) and 714(a) (1990) as passed by the Senate). The Conference Report rejected the Senate bill's language and instead adopted the plain language, now codified in section 1437d(*l*)(6), that unqualifiedly authorizes evictions for "any drug-related criminal activity." *See* H.R. CONF. REP. No. 943, at 418 (1990); *see also Hous. Auth. v. Green*, 657 So. 2d 552, 554 (La. App. 1995) ("That a Congressional committee may not have intended for tenant evictions to take place in the absence of knowledge does not change the fact that when the Congress as a whole enacted this law it did so without the imposition of a knowledge requirement").

This Court will of course review the entire history of section 1437d(*l*)(6)'s initial enactment, HUD's creation of implementing regulations, and Congress' later amendments strengthening the section, instead of just one passage from a Senate report on an unenacted version of one such amendment. This full consideration will show why Congress intended to endow PHAs with broad discretion to evict tenants, in those cases in which the authorities find it appropriate, for "any drug-related crime" by the tenant's household members, guests, or other persons under their control. By mandating that public housing leases contain provisions affording PHAs that discretion, as several state courts have noted in affirming evictions based on such provisions, "'Congress enacted a straightforward practical method of dealing with a serious public safety problem.'" *Syracuse Hous. Auth. v. Boule*, 701 N.Y.S.2d 541, 542 (App. Div. 4th Dep't 1999) (quoting *City of S. San Francisco Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367, 371 (Cal. App. Dep't Super. Ct. 1995)).

B. The Complete Legislative History Of Section 1437d(*l*)(6).

In 1988, facing a crisis of drug-related crime and violence in public housing projects, Congress took decisive steps toward improving living conditions in such housing. Beginning with the observations that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime" (42 U.S.C. § 11901(1)–(2)), Congress decided to create an efficient mechanism for ridding public housing of those who sell or use drugs or commit other dangerous crimes.

Using unmistakably clear language, based on reasonable findings as to its necessity,[2] Congress made criminal activity

2. Congress made three other related findings:

> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.

(42 U.S.C. § 11901(3)–(5))

by a public housing tenant or a member of the tenant's household a sufficient ground for eviction. Specifically, Congress required all local housing authorities to use leases that

> provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. (42 U.S.C. § 1437d(*l*)(5) (1989))

Two years later, after hearings in which opponents of the rule urged Congress to modify it to require PHAs to prove a tenant's knowledge and control of the wrongdoer,[3] Congress not only declined to make such changes, but instead clarified the requirement by making it apply to "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity." 42 U.S.C. § 1437d(*l*)(5) (1991).[4] That it made such

3. *See Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101–234, at 90–91 (1989) (testimony by Associate Director of the ACLU); *see also id.* at 86–87 (pointing to several cases in which ignorant tenants had been subjected to eviction proceedings); *Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of Other Tenants*, WALL ST. J., July 6, 1989 at A12.

4. *See* Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101–625, § 504, 104 Stat. 4185 (1990). In 1996, Congress replaced the phrase "on or near such premises" with "on or off such premises." 42 U.S.C. § 1437d(*l*)(5) (1997). In 1998, the section was redesignated as subsection (*l*)(6). *Id.* (1999).

a change after receiving testimony urging it instead to adopt the rule imposed by the Ninth Circuit makes clear that "Congress specifically considered the ramifications of the statute, and intended precisely what the plain reading . . . entails." *Burton*, 2001 WL 1379724, at *5 (discussing ACLU testimony).

HUD then promulgated regulations to implement this requirement that tenants take responsibility for helping to curtail crime. Housing and Urban Development Lease Requirements, 24 C.F.R. § 966.4(*l*)(2)(ii) (1993), 56 Fed. Reg. 51,560, 51,578 (1991). In so doing, HUD recognized Congress' determination that drug-related crime by household members poses "a special danger to the security and general benefit of public housing residents warranting special mention in the law," and that Congress had thus "specified that these types of criminal activity by household members are grounds for termination of tenancy without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated violation or other good cause for eviction." 56 Fed. Reg. 51,566–51,567 (1991).

Like the controlling statute, the implementing regulations require local housing authorities to secure leases from each of their tenants in which the tenant promises

> [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit. (24 C.F.R. § 966.4(f)(12)(i))

In formulating these regulations, HUD considered comments by legal aid and tenant organizations similar to those received by Congress in 1989, *i.e.*, that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household" and "should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, . . . did not participate, give consent or approve the criminal activity, or . . . [did] everything 'reasonable' to control the criminal activity." 56 Fed. Reg. 51,560, 51,566 (1991). As Congress had done, HUD ultimately decided not to accept these suggestions. Instead, following the statute, which contained no such caveat, HUD stated quite explicitly that a tenant "should not be excused from contractual responsibility by arguing that [he or she] did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51,567.

While the regulation clearly grants PHAs the power to evict the "innocent tenant" because of the acts of others, it also emphasizes that PHAs have discretion in the exercise of that power:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the

> circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. (24 C.F.R. § 966.4(*l*)(5)(1))

Beyond specifying factors to consider in exercising its discretion, the regulations note different remedies short of eviction that a PHA has the option to employ, like "permit[ing] continued occupancy by remaining family members and . . . impos[ing] a condition that family members who engaged in the proscribed activity will not reside in the unit," or "requir[ing] a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit." *Id.*

HUD offered several reasons for its decision. First, it noted that holding tenants contractually responsible for the acts of anyone occupying a unit is "a conventional incident of tenant responsibility under normal landlord-tenant law and practice," and a "valuable tool for management of the housing." 56 Fed. Reg. 51,560, at 51,567. Second, HUD recognized that allowing tenants to escape eviction by claiming ignorance "would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members" and "thereby undercut the tenant's motivation to prevent [such] activity." *Id.* Third, PHAs may often have difficulty proving in court that the leaseholder knew or had control over the offender, thus making it time-consuming and costly to evict households causing drug-related problems. *Id.* Regardless of fault, as HUD noted, "a family which does not or cannot control drug crime, or other criminal

activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." *Id.*

HUD's conclusions properly acknowledged a grave reality. The seemingly intractable problem of crime, especially drug-related crime, has long victimized law-abiding tenants of public housing. The pervasiveness of drugs and drug-related crime has caused families who cannot afford to move elsewhere to live in fear for their own safety and that of their children. *The Drug Problem and Public Housing: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, H.R. REP. No. 101-1019 (1989) (testimony of Nancy Brown, Chairperson, State of Connecticut Task Force on Public Housing and Drugs). The dramatic decline in violent crime enjoyed in recent years in many areas of the country has not fully reached impoverished, inner-city neighborhoods. Those who are too poor to move from those areas "must walk the streets that the rest of us can avoid or never confront. For crime-plagued inner-city housing tenants, the only real choice is between being homeless and coping with crime." *Crime in America: Three Ways to Prevent It, Hearings on H.R. 3 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1995 WL 20741, at 9 (Jan. 20, 1995) (statement of John J. Dilulio, Jr., professor of politics and public affairs at Princeton University and Director of the Brookings Institution's Center for Public Management). Too often, efforts to improve the quality of life in these poorest of neighborhoods, including efforts to evict drug dealers, are stymied by legal challenges. *Id.*

Despite the severity of this problem, housing authorities in many areas of the country began to make significant

inroads in the 1990s toward making public housing safer for law-abiding residents. Eviction of tenants who engage in drug-related activity, or whose guests or household members do so, formed a significant part of a comprehensive—and successful—crime-fighting strategy. In Toledo, Ohio, drug-related crimes declined 24% and other crimes 69% in the first year after the Toledo Housing Authority adopted such a policy. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra*, at 13. In Greensboro, North Carolina, the housing authority reported a stunning 60% drop in drug arrests over four years as a result of a comprehensive strategy of community policing, increased police involvement in screening applicants and reporting drug crimes to the authority, and a strict-liability eviction policy like the one at issue here. *Id.* at 13–14.

Given the success of these programs, it is not surprising that Congress would wish to implement them on a national scale. In March 1996, four and a half years after HUD promulgated its first regulations, President Clinton signed the Housing Opportunity Program Extension ("HOPE") Act of 1996, which strengthened PHAs' ability to screen out and evict drug dealers and other criminals who prey on their law-abiding neighbors. Pub. L. No. 104–120, § 9, 110 Stat. 834, 836 (1996). President Clinton announced a "One Strike And You're Out" policy encouraging housing authorities to fully use these new powers. *See Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing*, 32 WEEKLY COMP. PRES. DOC. 582, 582–85 (Mar. 27, 1996); *Address Before a Joint Session of the Congress on the State of the Union*, 32 WEEKLY COMP. PRES. DOC. 90, 94 (Jan. 23, 1996) ("I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule

for residents who commit crime and peddle drugs should be one strike and you're out"). The "One Strike" policy partly bases an authority's receipt of federal funds on its use of leases that clearly make any drug-related or other serious crime by a household member grounds for eviction. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra*, at 3–4, 7.

In implementing its "One-Strike" policy, HUD noted the success of such policies in achieving the regulations' primary goal—the safety of law-abiding tenants:

> At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. There are many eligible, law-abiding families who are waiting to live in public and assisted housing and who would readily replace evicted tenants. By refusing to evict or screen out problem tenants, we are unjustly denying responsible and deserving low-income families access to housing and are jeopardizing the community and safety of existing residents who abide by the terms of their lease. (*Id.* at 4)

In promulgating the "One-Strike" policy, then–HUD Secretary Henry Cisneros identified "the number one group of people" demanding such a policy: "[public housing] residents themselves," who had been forced to "put children to sleep in bathtubs" and otherwise abandon their rights and dignity because of ambient violence created by armed drug dealers, and intimidation and oppression visited on tenants who opposed them. D. Saffran, *supra*, at 34.

Responding to concern about innocent family members who might face eviction because of a household member's crimes, the President and the Secretary noted that this "innocent grandmother" argument ignores a crucial reality: Public housing is a scarce resource available only to a fraction of the poor people who desperately need it. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra*, at 4. For every unit of public housing, three poor families are on the waiting list, the vast majority of whom are fully law-abiding and would not endanger other tenants. D. Saffran, *supra*, at 35. Or, as President Clinton said in announcing the "One-Strike" policy: "The people who are living [in public housing] deserve to be protected, and the good people who want to live [there] deserve to have a chance," making it wrong to allow households that harbor criminals or have proven unable to prevent crime by members or guests "to use up homes that could make a big difference in the lives of decent families." *See id.* at 36.

Beside giving housing authorities an effective tool for combating crime in public housing, the HUD regulation promotes the struggle against drug-related crime within families themselves. As noted during floor debate on the Anti-Drug Abuse Act of 1988, too often those engaged in drug-related activity have used the homes of family members and friends as a base of operations. Because they themselves were not on the lease, these individuals previously operated without fear of eviction. 134 CONG. REC. H11108, H11109 (1988) (remarks of Rep. Wylie). Instead of pulling households apart, the lease provision permitting eviction of the entire household encourages families to confront the problems of crime and drugs in their midst. By requiring household members to assume responsibility for their own acts and those of the people they invite into their home, the lease provision

promotes action by the individuals closest to those engaging in criminal activity, at a level where such action is likely to be most effective.

CCI sympathizes with those tenants who, despite being ignorant of their relatives' or guests' wrongdoing, face eviction from their homes. But the most important question is not whether they have been completely innocent or tacitly acquiescent, but rather how society should allocate scarce housing resources in order to do the most good and cause the least suffering to its most vulnerable members. Moreover, we urge the Court to recognize that it is far from uncommon for innocent tenants to be evicted from private housing for violations of their leases based on the illegal activity, or even the non-criminal misconduct, of their relatives and guests—on the theory that they have a contractual obligation to prevent such activities in or near their homes by persons under their control. "The government, given its status as a landlord, must be given the authority to maintain its property at a habitable and safe standard for all of its tenants." *Burton*, 2001 WL 1379724, at *2. Such a practice *can* have a harsh impact on the blameless relatives of troublemaking youth, but it allows the rest of the children in a community to grow up in decent, safe and nurturing surroundings. The "One-Strike" policy extends this same protection to children growing up in public housing projects.

II.

PETITIONERS' STRAIGHTFORWARD APPLICATION OF THE PLAIN LANGUAGE OF SECTION 1437d(*l*)(6) DOES NOT YIELD "ABSURD" RESULTS.

Section 1437d(*l*)(6) gives Petitioner the Oakland Housing Authority (and similar local authorities around the nation) an essential, effective weapon to protect the public housing community for which it is responsible. The section's grant of authority and discretion to the local authority reflects one of the fundamental tenets of federal housing law: "to vest in public housing agencies . . . the maximum amount of responsibility and flexibility in program administration." 42 U.S.C. § 1437 (Declaration of Policy). The dissenting judges below noted that such localization of power was one purpose of § 1437d(*l*)(6). *Rucker II*, 237 F.3d at 1133 (Sneed, J., dissenting) (quoting floor debate).

The devolution of power and responsibility effected by section 1437d(*l*)(6) runs not only from federal to local authorities. The section also makes each family within a public housing community share the responsibility for curtailing drug crimes. By treating the household as a unit, the lease provisions required by HUD's regulation give tenants an incentive to confront and deal with household members who use drugs or commit other crimes, rather than enabling and harboring, or just turning a blind eye toward, such conduct. The results of HUD's straightforward application of a provision that has proven effective at removing drug dealers from public housing, by eliminating their base of operations, are far from absurd. The challenged regulation instead carries out Congress' intent to allocate scarce public housing funds preferentially to families that

successfully avoid or eliminate drug-related activity in and around their homes. Such a result is eminently sensible.

The court below nonetheless held otherwise. The Ninth Circuit improperly concluded that this was the sort of exceptional case in which to assume that Congress, despite having drafted a seemingly clear statute, cannot have meant what it said because the results of applying its plain language would be "absurd." *Rucker II*, 237 F.3d at 1124 (citing *United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994)). The court found it necessary to "look no further than the facts of this case," noting HUD's concession at argument that, while Respondent Pearlie Rucker could have done no more to protect herself from eviction, the statute "authorized her eviction nonetheless." *Id.* This is not an "absurd result," however, because the statute merely "authorized" that eviction; it did not compel it. The challenged regulations expressly accord local housing authorities "discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. § 966.4(*l*)(5)(i). Indeed, as the dissent below noted, this case in fact illustrates the importance of that discretion, as the OHA decided "[i]n an exercise of its 'humane judgment' . . . not to seek the eviction of plaintiff Rucker." *Rucker II*, 237 F.3d at 1137 n.13.

Looking beyond the facts of Ms. Rucker's individual case, the misplacement of the court's "absurd results" argument becomes clear when one focuses on the only actual "result" of the statutory and regulatory framework at issue. That result is to subject public housing tenants, if they fail to prevent drug-related crimes by persons staying with them,

to the *discretion* of the local housing authority that is responsible for their community.

In exercising that discretion, the local authority is expressly empowered to consider all circumstances of a tenant's case in deciding whether to enforce a contractual eviction term. 24 C.F.R. § 966.4(*l*)(5)(l); *see also Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 702-703 (Minn. 1999) (approvingly noting that, "[u]nder HUD regulations, PHAs retain the discretion to craft eviction policies that protect other PHA tenants and the larger community while allowing for consideration of individual circumstances"). If the statute and regulations *mandated* eviction of "innocent tenants" in some or all cases, their results might be deemed "absurd." But the result of entrusting that decision to local housing authorities, rather than state or federal courts, plainly is not. *See Lor*, 591 N.W.2d at 702–704 (delineating respective roles of PHAs and state eviction courts). Such devolution of authority reflects Congress' express policy for federally assisted public housing. *See* 42 U.S.C. § 1437 (quoted *supra*).

The "absurd results" argument improperly presumes that local housing authorities will abuse that discretion with sufficient frequency that the result of the regulations' operation—*i.e.*, conferring that discretion—is absurd. Other than its misguided invocation of Ms. Rucker's situation, the court did not point to any evidence that local housing authorities have actually sought to evict tenants based on the sort of hypothetical, hypertechnical violations the opinion posited. *See, e.g., Rucker II*, 237 F.3d at 1124 (imagining eviction based on household member's drug conviction years before). The implicit assumption—that local housing authorities will enforce the requisite lease provisions like sadistic robots—is groundless.

In reality, vesting discretion in local housing authorities to evict tenants who fail to prevent their household members or guests from committing drug-related crimes, without requiring those authorities to prove in court that such tenants were reckless or negligent, serves vital interests besides devolving authority. The dissenting judges below ably explained the tremendous practical difficulties of proving in court that a tenant knew or recklessly avoided learning of a household member's criminal activity. *See id.* at 1135-37 (Sneed, J., dissenting). The only parties likely to be able to offer competent evidence on the issue are the household member and tenant, who are unlikely to cooperate, and, in some cases, other residents of the public housing project. *See id.* at 1136. But lengthy eviction procedures afford drug dealers ample time to intimidate such potential witnesses, making evictions impossible.

Such intimidation completes a vicious cycle. Drug dealers entrench themselves in public-housing communities, terrorize the majority of law-abiding residents, and then exploit legal procedures to thwart housing authorities' attempts to remove them, perfecting the intimidation and dispiritment of law-abiding residents. The latter's rational self-interest, finally, leads them to view housing authorities as "'paper tigers'" unable to help or protect them, and with whom it is unsafe to cooperate. *Id.* at 1136 (Sneed, J., dissenting) (quoting 134 Cong. Rec. at E1965–02 (June 14, 1988)). In trying to regain the trust and cooperation of such residents for the task of making public housing safe and livable, "Congress was aware . . . that success could only be reached by ridding these public housing units of the drug-related criminal activity, and giving the law-abiding tenants control over their living situations." *Burton*, 2001 WL 1379724, at *7; *see also Drugs in Federally*

Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, S. Doc. No. 101–234, at 27 (1989) (testimony of Mayor of Alexandria, Va.) (describing eviction provision as critical to "giv[ing] a sense of control back to the tenant leadership within communities"); DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra*, at 13–14 (recounting how one "One Strike" program increased significantly the percentage of residents who felt safe living in public housing, while another reduced by almost 90% the vacancy rate, which officials attributed to improved sense of safety). On their own, local housing authorities simply lack the necessary resources and prosecutorial powers to combat in court armed criminals willing and readily able to intimidate potential witnesses.

CONCLUSION

Applying the regulations invalidated by the court below implements Congress' intent to vest power in local housing authorities. That power is tempered by discretion to consider all the circumstances of innocent tenants' cases and refrain from evicting them. That result is not absurd, but essential to the sound public policies that underlay the regulations and the statute authorizing them.

DATED: November 20, 2001.

Respectfully submitted,

H. JOSEPH ESCHER, III
Counsel of Record
KEITH D. KESSLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4065
(415) 434-1600
Attorneys for Amicus Curiae
Center for the Community Interest